



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 97 156 50132 Office: CALIFORNIA SERVICE CENTER

Date: JAN 11 2002

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act,
8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

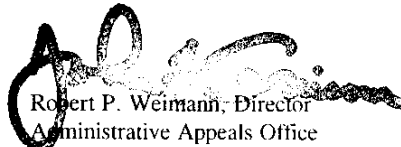
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Weimann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The Associate Commissioner for Examinations dismissed the subsequent appeal. The matter is now before the Associate Commissioner for Examinations on motion to reopen. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is an import, export, retail and international marketing business. It seeks to employ the beneficiary temporarily in the United States as its sales manager. On July 22, 1997, the director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner claimed that the beneficiary would be employed in a primarily managerial capacity and submitted additional evidence to support this claim.

On May 26, 1999, the Associate Commissioner dismissed the appeal reasoning that the evidence submitted by the petitioner had not overcome the objections of the director. In the decision, the Associate Commissioner found that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be employed in a managerial capacity.

On motion, counsel for the petitioner asserts that the Associate Commissioner's decision was arbitrary and unreasonable. Counsel further states that the Associate Commissioner did not address the allegation that the beneficiary had been approved for this visa classification prior to the director's written decision on July 22, 1997.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The United States petitioner was incorporated in June of 1993. It is currently wholly owned by China National Service Corporation for Chinese Personnel Working Abroad (CSC). The petitioner is primarily engaged in the import, export, retail and international marketing business. The petitioner seeks to employ the beneficiary as a sales manager.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

In the previous decision, it was determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be primarily managing or directing an essential function of the organization rather than performing the function. It was also determined that the petitioner had not demonstrated

that the beneficiary would be functioning at a senior level within an organizational hierarchy other than in position title.

On motion, counsel asserts that the beneficiary will supervise professionals, will direct and manage all aspects of the operation of a division as an essential function and will exercise discretionary authority over day-to-day operations of that function. In addition, counsel asserts that the reasoning used by the Associate Commissioner contradicts the reasoning of the director when applying the law to the facts of this case. Finally, counsel takes issue with the telephonic communication from Service Center personnel that the petition had been approved and the later written confirmation that the petition had been denied.

The record provides the description of the proposed job duties of the beneficiary. In brief, the beneficiary's duties are described as a sales manager who will develop sales strategies to promote the company's products, identify new American goods for export, train sales staff, implement CSC's export procedures, and manage the preparation of reports to senior executives at CSC.

The record also includes a description of the education and current duties of two employees the beneficiary would supervise if granted L-1 status. The first, a sales representative, obtained a Bachelor of Arts (BA) degree from Beijing University and a certificate of completion of an English course at Cornell University. Her job duties include contacting customers, developing promotional programs, selling products to visiting customers and replacing inventory. She also will brief her supervisor on product trends. The second employee, a sales consultant, holds a college diploma from the Shanghai Institute of Foreign Trade and has been certified as an economist by the Review Committee of Shanghai Municipal Commission of Foreign Trade and Economic Relationship. His job duties include contacting vendors to identify and select American goods for export, advising on CSC's export procedures, implementing shipping arrangements and assisting in floor sales. The petitioner also noted that this employee would be leaving his position and would be replaced with someone else.

The petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The duties of the supervised employees consist of buying and selling goods for the Chinese market with the attendant inventory and shipping responsibility associated with a retail operation. In this case the daily activities of the supervised employees are not professional in nature.

Further, despite counsel's assertions, the record contains insufficient evidence to demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company. The day-to-day activities

of the beneficiary include performing the requisite duties of the petitioner rather than managing others who perform the essential functions. The petitioner's evidence does not show that the beneficiary will be functioning at a senior level within an organizational hierarchy.

Counsel asserts that the director and the Associate Commissioner's decisions are contradictory. The director determined that the petitioner, at its stage of development, could not realistically support a position involving primarily managerial or executive responsibility. The Associate Commissioner determined that it was unreasonable for one sales representative and one sales consultant to provide all the necessary services to the petitioner's customers. Counsel's assertion that these positions are contradictory is based on a misunderstanding of the managerial capacity concept. The director and the Associate Commissioner are essentially stating that, based on the record, the beneficiary will be required to perform daily tasks that are necessary for the operation of the petitioner as opposed to managing others who will perform those tasks.

Finally, counsel asserts that notice of an approval of the beneficiary's L-1 visa was provided verbally and should be given some weight in the final determination of the beneficiary's eligibility. However, INS records do not reflect an approval of an L-1 visa in this matter. Further, 8 C.F.R. 103.2(b)(19) requires that an applicant or petitioner be sent a written decision on his or her application, petition, motion, or appeal. INS records reflect that a written decision denying the petition was prepared on July 22, 1997.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The Associate Commissioner's decision dated May 26, 1999 is affirmed. The petition is denied.